87-1617

No. _____

In the Supreme Court of the United States

October Term, 1987

PAUL NEWMAN, GEORGE ROY HILL, AND PAN ARTS PRODUCTION CORPORATION,

Petitioners,

v.

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, INC., and MCA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a plaintiff who receives fixed residual prices for his past services as a direct result of a price-fixing conspiracy fail to suffer antitrust injury merely because his agreements were executed prior to the formation of the conspiracy?

PARTIES BELOW

Petitioner Paul Newman is an internationally renowned actor. Petitioner George Roy Hill is a well-known director of motion pictures. Pan Arts Production Corporation is a closely held corporation through which George Roy Hill, its owner, markets his services as a director.

Respondent Universal Pictures produces and distributes motion pictures, and is a division of Universal City Studios, Inc. Respondent MCA, Inc. also produces and distributes motion pictures. Universal City Studios, Inc. is a wholly owned subsidiary of MCA, Inc.

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OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc* appears as Appendix A, p. A1. The Ninth Circuit's opinion is reported at 813 F.2d 1519 (9th Cir. 1987) and appears as Appendix B, pp. B1-B8. The district court's order dismissing the antitrust complaint appears as Appendix C, pp. C1-C4.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Ninth Circuit affirming the district court's dismissal of the

petitioners' antitrust complaint was entered on April 10, 1987. Petitioners filed a petition for rehearing and rehearing *en banc* on April 20, 1987. The panel directed respondents to file a response to the petition on September 30, 1987. Respondents filed a response on October 20, 1987. The Ninth Circuit denied the petition for rehearing and rehearing *en banc* on December 31, 1987. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> . . .

The Clayton Act, 15 U.S.C. § 15 provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . .

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness of Appeal

Petitioners appealed from a decision of the United States District Court for the Central District of California dismissing their antitrust complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. § 15.

The Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the district court's decision pursuant to 28 U.S.C. § 1291. On September 30, 1985, petitioners timely filed a notice of appeal pursuant to 28 U.S.C. § 2107 and Fed. R. App. P. 4(c). The Ninth Circuit affirmed the district court's decision on April 10, 1987, and denied the petition for rehearing and rehearing *en banc* on December 31, 1987.

B. Statement of Facts

1. Background

Paul Newman[1] filed an antitrust action against Universal Pictures and MCA, Inc. [hereinafter "Universal"], alleging that Universal and other major motion picture studios engaged in a horizontal buyer price-fixing conspiracy, a per se violation of the antitrust laws.[2] The purpose of the conspiracy was to artificially depress the prices paid to artists for their services in making motion pictures.

In contracting with industry artists, major studios frequently agree to pay key artists a percentage of the gross proceeds received by the studios from exhibition of the film. These contracts are known as profit participation agreements. Historically, the film's gross proceeds were derived from exhibition in movie theatres and on television, including both free television and pay cable channels. Beginning in the late 1970's or early

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[1]For convenience, this petition will refer to petitioners Paul Newman, George Roy Hill and Pan Arts Production Corporation collectively as "Newman."

[2]As the district court dismissed this action at the complaint stage, all material allegations in the complaint are taken as true and the pleader is entitled to every favorable inference. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

1980's, the studios began to distribute films on video cassettes and discs.[3] Since that time, the studios have enjoyed increasing revenues from the sale and rental of video cassettes and discs.

In or about 1981, Universal and the other major motion picture studios fixed the formula by which the artists' share of video revenues was to be computed. Specifically, the studios agreed that the artists' share would not be calculated from gross video proceeds. Instead, the studios agreed to compute the artists' share from a base of approximately 20% of the gross video proceeds, which were denominated as "production revenues." The remaining approximately 80% of video proceeds would be designated "distribution revenues" and retained by the studios. The studios concocted this formula as a ruse to diminish the artists' share of the burgeoning video revenues.

The studios' price-fixing conspiracy rigged the prices for all artists on an industry-wide basis. The conspiracy applied both to artists who received residual payments under existing profit participation agreements as of 1981 and to those who signed subsequent agreements. The studios were able to fix prices paid under pre-1981 agreements because profit participation is calculated annually based on gross proceeds received by the studio from film exhibition during the previous year. The studios included video revenues in the gross proceeds under pre-1981 agreements, but they calculated the artists' annual share from the fixed base of 20% of gross video revenues pursuant to the conspiracy.

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[3] All or most of the major studios that produce and distribute motion pictures have established subsidiaries or other entities to distribute the films through video cassettes and discs. Universal and MCA have arranged for MCA Video Cassette, Inc., a subsidiary of MCA, to distribute films that Universal has produced.

Newman was a direct and intended victim of the studios' conspiracy. In the 1970's, Newman executed profit participation agreements with Universal that entitled him to a percentage of the gross proceeds derived from both "The Sting" and "Slapshot." In 1981, Universal included video revenues in calculating Newman's profit participation share of the films' gross proceeds. Pursuant to the price-fixing conspiracy, however, Universal calculated Newman's share based on the fixed 20% of gross video revenues. Newman therefore received artificially depressed prices for his services as a direct result of the price-fixing conspiracy.

2. The Proceedings Below

Pursuant to Clayton Act § 4, Newman filed an action on April 30, 1985 against Universal alleging a horizontal buyer price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Universal moved on June 20, 1985 to dismiss Newman's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Universal raised two grounds for dismissal: (1) the complaint did not properly allege a price-fixing conspiracy; and (2) the complaint did not properly allege the conspiracy's anticompetitive effects.

The district court heard Universal's motion on September 9, 1985 and perfunctorily dismissed the complaint without stating the reasons for dismissal. Newman appealed the district court's order to the Ninth Circuit. The Ninth Circuit accepted as true the well-pleaded allegations of a price-fixing conspiracy, the anticompetitive effects of which are presumed, but held that Newman had not suffered antitrust injury.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Ninth Circuit's bizarre holding that Newman, the recipient of fixed prices, does not suffer antitrust injury from the studios' price-fixing conspiracy is directly contrary to this Court's established precedent. Increasingly, lower courts have misused antitrust injury analysis to undermine the substantive laws and deny recovery to plaintiffs whose lawsuits concededly serve the public's interest in antitrust enforcement. The *Newman* case presents this Court with the perfect opportunity to articulate the principles of antitrust injury analysis for the lower courts to ensure that antitrust injury is consistent with the purposes of the antitrust laws and private enforcement.

In its opinion, the Ninth Circuit accepted as true Newman's allegations that the major motion picture studios engaged in a horizontal conspiracy to fix the prices paid to artists for their services in making motion pictures. The conspiracy's anticompetitive effects were presumed. The court also assumed that the price-fixing conspiracy directly and proximately caused Newman to receive fixed prices for his services. Yet the Ninth Circuit concluded that Newman suffered no antitrust injury and dismissed the case.

How is it possible that a direct victim of a horizontal price-fixing conspiracy does not suffer "antitrust" injury? Antitrust injury, as the concept has been developed by this Court, requires that the plaintiff's injury flow from the violation's restraint on competition. Newman's injury, the difference between the fixed price he received and the competitive price, is precisely the type of injury that price-fixing is likely to cause.

The contrary result in *Newman* stems from the Ninth Circuit's rejection of this Court's standard in favor of a more restrictive, hypertechnical test for antitrust injury. That test requires the plaintiff's injury to mirror precisely the violation's most narrowly defined anticompetitive effect. Here, the Ninth Circuit held Newman had not suffered antitrust injury solely because competition for Newman's services had ended prior to the 1981 conspiracy. The studios' price-fixing did not affect Newman's decision to enter into his profit participation agreements for "The Sting" and "Slapshot," which were executed before the 1981 conspiracy.

In reaching its decision, the Ninth Circuit utterly ignored the fact that although competition for Newman's services had ended, the studios' ability to fix the prices paid annually to Newman and all other pre-1981 profit participants continued. The court's antitrust injury test thus eliminated a sizeable number of plaintiffs who, as victims, have the incentive to challenge the studios' conspiracy. The net result is that the studios continue to fix prices with impunity and retain their unlawful profits. Ironically, the Ninth Circuit's antitrust injury test produces an outcome wholly contrary to the antitrust laws it was intended to serve.

B. The Ninth Circuit Misconstrued and Misapplied the Antitrust Injury Requirement

The Ninth Circuit's decision in *Newman* exemplifies the perverse use of antitrust injury analysis to undermine the antitrust laws and curtail private enforcement. Applying the strictest possible antitrust injury standard, the Ninth Circuit required Newman to prove that the studios' price-fixing conspiracy restrained competition as to his services. The net result was that the studios escaped liability because of the fortuity that Newman,

concededly a direct recipient of fixed prices, executed his profit participation agreements before the conspiracy. Yet nowhere does the Ninth Circuit articulate any countervailing policy to justify imposition of an antitrust injury test that produces an outcome so contrary to the Sherman Act. In the words of *Brunswick*, this antitrust injury definition "divorces antitrust recovery from the purposes of the antitrust laws." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

Simply stated, the Ninth Circuit's antitrust injury test requires that Newman's injury mirror precisely the most narrowly defined anticompetitive effect of the studios' price-fixing conspiracy.[4] The court first defines the

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[4]While the Ninth Circuit has produced the greatest number of antitrust injury opinions, other lower courts have seized upon this "mirror image" notion of antitrust injury. These courts similarly require the plaintiff's injury to fall within the violation's most narrowly defined anticompetitive effect. Cumulatively, these precedents have restricted private enforcement and undermined the force of the substantive antitrust laws.

The debate over the appropriate definition of antitrust injury has also created conflicting decisions between circuits as well as within individual circuits. For intercircuit conflict, *compare Aurora Enters., Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) *with Repp v. F.E.L. Publications, Ltd.*, 688 F.2d 441 (7th Cir. 1982); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) *with In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.*, 460 U.S. 1016 (1983).

For intracircuit conflict, *compare Aurora Enters., Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) *with Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1987) *with Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.) (role of

violation's narrowest anticompetitive effect and then determines whether the plaintiff's injury mirrors those precise effects. Any deviation defeats the plaintiff's right to recovery.

The Ninth Circuit's application of its standard in the *Newman* opinion is instructive. The court assumed that the studios' horizontal conspiracy to fix prices constituted a per se antitrust violation whose anticompetitive effects are presumed. *Newman*, 813 F.2d at 1522-23.[5] However, the court construed the presumed anticompetitive effect as narrowly as possible. In Newman's case, the sole cognizable anticompetitive effect of price-fixing was on the artists' initial decision to contract with studios for his services.

The cryptic holding in *Newman* rests entirely on the fact that Newman's profit participation agreements with Universal were signed between 1972 and 1976, before the price-fixing conspiracy arose in 1981. *Id.* at 1522. The court reasoned that the price-fixing conspiracy could not affect competition for Newman's services at the time the agreements were made. *Id.* Newman's price, negotiated in an open market, reflected his market value at the time the agreements were executed.

The Ninth Circuit's requirement that the plaintiff's injury mirror the unrealistically narrow view of the

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substantive law in determining antitrust injury), *cert. denied*, 469 U.S. 1018 (1984).

[5]At one point in its opinion, the Ninth Circuit appears to suggest that if the conspiracy does not cause Newman antitrust injury, "there can be no antitrust violation." 813 F.2d at 1522. Clearly, however, determination of the existence of the antitrust offense and antitrust injury requires distinct analyses. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977).

anticompetitive effects of price-fixing is flatly inconsistent with this Court's articulated antitrust injury standard in *Brunswick* and *McCready*. In assessing antitrust injury, this Court examines not only the plaintiff's individual injury but also its relationship to the purposes of the antitrust laws and private enforcement.

1. The *Brunswick/McCready* Test for Antitrust Injury

This Court has articulated a two-part test to determine whether a plaintiff has suffered antitrust injury. First, the plaintiff must show that the defendant's conduct restrains competition. *Brunswick*, 429 U.S. at 487. Second, the plaintiff must prove that its injury flows from either the violation's anticompetitive effects or conduct in furtherance of the anticompetitive objective. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482-83 (1982). This broad-based test was intended to balance the competition and enforcement interests underlying the Sherman Act. It ensures that antitrust recoveries are linked to the purposes of the antitrust laws and eliminates undue limitations on private antitrust enforcement.

The Supreme Court first established the antitrust injury requirement in its seminal *Brunswick* decision. In *Brunswick*, this Court held that the plaintiffs had to prove the defendant's conduct, the source of its injury, restrained competition. The plaintiffs in *Brunswick* contended that the defendant's acquisitions of several financially troubled bowling centers violated Clayton Act § 7 because the defendant's size gave it the capacity to lessen competition in the future. The plaintiffs conceded, however, that the defendant had never actually exercised its market power to reduce competition. Thus,

the plaintiffs could not link their claimed past injury to any actual lessening of competition in the market. In fact, the acquisitions had *enhanced* competition by maintaining the acquired bowling centers as competitors in the market. The Court held that allowing the plaintiffs to recover for continued competition, the very goal of the antitrust laws, would "make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws." *Id.* at 487.[6]

Thus, *Brunswick*'s analysis identifies two elements of antitrust injury. A plaintiff must show: (1) conduct producing actual anticompetitive effects, and (2) injury flowing from a reduction, and not an increase, in competition. The Court embodied this two-part inquiry in its oft-quoted antitrust injury formulation:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (citation omitted).

In its second antitrust injury opinion, this Court in

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[6]The *Brunswick* decision made clear that the plaintiff need not prove an actual lessening of competition to recover. Conduct having long term anticompetitive effects (such as predatory pricing) may cause antitrust injury before competitors are actually driven from the market. 429 U.S. at 489 n.14.

McCready clarified the second prong of the *Brunswick* test—the requisite relationship between the plaintiff's injury and the anticompetitive conduct. McCready was a subscriber of Blue Shield's insurance plan. She alleged that Blue Shield conspired with psychiatrists to exclude psychologists from the psychotherapy market. In furtherance of that conspiracy, Blue Shield refused to reimburse subscribers who selected psychologists for treatment instead of psychiatrists.

The Court interpreted *Brunswick* to require only that McCready's injury be linked to the competition policies underlying the antitrust laws. 457 U.S. at 482. That requirement was satisfied if McCready's injury were the direct result of *either* the violation's anticompetitive effect *or* the violator's attempt to pursue its anticompetitive scheme. *Id.* at 482-83.[7] The Court expressly rejected as unrealistically narrow the standard advanced by Blue Shield and adopted by the dissent limiting antitrust injury to that reflecting the most obvious anticompetitive effect of the boycott against the psychologists. *Id.* at 484 n.21.[8]

The Court concluded that "McCready's injury 'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick*, and falls squarely within the

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[7]The Court's formulation is consistent with the holding in *Brunswick* that "[t]he injury should reflect the anticompetitive effect *either* of the violation *or* of anticompetitive acts made possible by the violation." 429 U.S. at 489 (emphasis added).

[8]Much like the Ninth Circuit's *Newman* decision, the dissent in *McCready* argued that the proper focus of antitrust injury analysis was on whether the defendant's conduct was anticompetitive (narrowly defined) as to the plaintiff. 457 U.S. at 488-89. The Ninth Circuit's adoption of the very "mirror image" antitrust injury test rejected by this Court illustrates the circuit's utter disregard of established precedent in the antitrust injury area.

area of congressional concern." *Id.* at 484. Blue Shield's scheme sought to reduce artificially the demand for psychologists' services. Blue Shield refused to reimburse subscribers, such as McCready, who chose treatment by psychologists instead of psychiatrists. Forced to incur the additional costs of patronizing a psychologist, McCready bore the brunt of Blue Shield's anticompetitive scheme.

The Court expressly premised its antitrust injury standard on § 4's language and purpose. In enacting § 4 with little restrictive language, Congress sought to enlist private antitrust enforcement in deterring violations, disgorging violators of their illegal profits and compensating victims. *Id.* at 472. These deterrent and remedial purposes governed application of § 4 and could be defeated only by some articulable, statutory policy to the contrary. *Id.* at 472-73.

The Court noted that permitting McCready to recover was consistent with § 4's purposes. Her lawsuit terminated the antitrust violation, disgorged Blue Shield of its unlawful profits and compensated a victim of the violation. *Id.* at 473 n.10. After examining the other procedural hurdles to recovery under § 4,[9] the Court found no countervailing interest dictating a contrary result.

Read together, *Brunswick* and *McCready* articulate a two-part test that should guide antitrust injury analysis by the Ninth Circuit. As of yet, however, the Ninth Circuit has failed to grasp the import of this Court's

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[9]A showing of antitrust injury is not sufficient to establish the plaintiff's right to recovery. The plaintiff must also satisfy the separate requirements of antitrust standing and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

decisions and has instead applied the "mirror image" formulation of antitrust injury that is inconsistent with this Court's precedent.

2. Newman Satisfies the *Brunswick/McCready* Antitrust Injury Standard

Under the *Brunswick/McCready* antitrust injury test, Paul Newman has clearly suffered antitrust injury from the studios' price-fixing conspiracy. The conspiracy to fix prices unquestionably satisfies the first requirement that the challenged conduct restrain competition. *Brunswick*, 429 U.S. at 487. As to the second part of the test, Universal manipulated Newman's prices in furtherance of the price-fixing conspiracy. *See McCready*, 457 U.S. at 483; *see also Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 12-15 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1301-04 (4th Cir. 1979).

Newman clearly satisfies *Brunswick*'s requirement that the defendant's conduct restrain competition. Horizontal price-fixing is the paradigmatic antitrust violation and is per se unlawful. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The proscription encompasses price-fixing by buyers as well as sellers. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

It is equally evident that Newman's injury flows from the reduction in competition caused by the studios' price-fixing. The studios' 1981 conspiracy injected fixed prices into the market for artists' services. The conspiracy's direct victims included not only those who negotiated subsequent profit participation agreements but also

those who had existing agreements as of 1981. Up until that time, Universal had paid Paul Newman the market value of his services, expressed in his profit participation agreements as a percentage of the film exhibition revenues. Subsequent to the conspiracy, Universal included only the fixed rate of video revenues, consistent with the objective of the studios' conspiracy. There is nothing to suggest that there was any reason other than the price-fixing conspiracy that induced Universal to pay Newman fixed residual prices, and the defendants did not offer any other reason before the lower courts.[10] Newman's injury flowed from Universal's conduct in furtherance of the conspiracy.[11]

Newman's injury is also consistent with the deterrent and compensatory purposes underlying the private enforcement provisions. The Supreme Court made clear in *McCready* that courts should not "engraft artificial limitations on the § 4 remedy" so as to defeat its broad deterrent and remedial purposes. 457 U.S. at 472-73.

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[10]The Ninth Circuit concluded that the studios' price-fixing was "unconnected" to Newman's injury as a matter of law. 813 F.2d at 1523. At a minimum, whether Newman's injury resulted from conduct in furtherance of the studios' price-fixing conspiracy is a question of fact. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1058-59 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984). The Ninth Circuit's holding, in the absence of any discovery or factual record, is clearly outside the scope of antitrust injury analysis.

[11]The measure of Newman's damages, the difference between the fixed and competitive prices, flows from the anticompetitive effect of price-fixing arrangements. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 240-41 (1948). Even the more avid proponents of a narrow antitrust injury standard agree. *E.g.*, Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 478-79 (1980).

Absent an articulable consideration of statutory policy, § 4 would be applied according to its broad purposes and the strong public interest favoring antitrust enforcement. *Id.*

The *Newman* decision engrafts precisely the type of artificial, hypertechnical limitation on antitrust injury that this Court warned against in *McCready*. To place the additional burden upon Newman to prove that his injury resulted from a lessening of competition vis-a-vis *his* services hardly furthers the procompetition purposes of the antitrust laws. In fact, the Ninth Circuit's artificial distinction between pre- and post-1981 profit participants produced an outcome contrary to the purposes of the antitrust laws. The studios' price-fixing continues, the studios retain their unlawful profits and a direct victim is denied compensation. In the face of this extraordinary outcome, the Ninth Circuit did not advance any countervailing justification for its restrictive injury test.

The *Newman* decision turns *Brunswick* on its head. Faced with the choice of allowing price-fixers to keep the fruits of their illegal conduct or according antitrust injury to a plaintiff with a "preconspiracy" agreement, courts should come down on the side of the innocent victim and not the wrongdoer.

C. This Court Should Reject the Lower Courts' Misuse of Antitrust Injury to Eviscerate the Antitrust Laws and Should Articulate the Proper Antitrust Injury Analysis

The lower courts have openly defied this Court's *Brunswick/McCready* antitrust injury standard. Spurred by a belief that antitrust violations are in fact procompetitive, these courts have sought to undermine

private enforcement of the substantive laws with which they disagree. Their restrictive injury test intentionally divorces antitrust injury from the purposes of the antitrust laws and serves only their views of what constitutes anticompetitive conduct. This Court should summarily reject the lower courts' efforts to overrule this Court's precedents and Congress' antitrust legislation.

The proponents of a narrow antitrust injury standard proceed from the view that many antitrust violations constitute efficient business conduct. In an article cited by many lower courts, one commentator candidly explains that a restrictive antitrust injury definition is necessary because antitrust violations may be "efficient business relationships" or "aggressive forms of competition." Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1460 (1985). In his view, these antitrust violations cannot cause antitrust injury.

The Supreme Court has rebuffed efforts by antitrust critics to detract from the substantive antitrust offenses.[12] The belief that antitrust compliance will preserve a competitive market structure that presumably will produce better goods and lower prices retains vitality. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

Having failed to persuade this Court and Congress to cut back on the substantive antitrust laws, antitrust

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[12] *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

critics have turned their attention to the relatively new area of antitrust injury. These courts and commentators have devised the restrictive "mirror image" injury test that is intended to reduce the ability of private litigants to enforce the substantive laws.

The mischief of the restrictive test is that it is simply a vehicle through which antitrust critics inject their views of the antitrust laws into the case law. In accordance with their position that antitrust violations are generally procompetitive, these courts define the violation's anticompetitive effect as narrowly as possible.[13] The requirement that the plaintiff's injury mirror that anticompetitive effect automatically eliminates a substantial number of potential plaintiffs. Moreover, the uncertainty involved in predicting what these courts will pick as the violation's narrowest anticompetitive effect also deters private actions.[14]

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[13]Under the guise of defining the violation's anticompetitive effects and antitrust injury, some courts have gone further and have rewritten the substantive offense entirely. The substantive laws should delineate the type of competition that the Sherman Act protects. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 532-35 (7th Cir. 1987). These courts, however, use antitrust injury analysis to overrule the substantive laws and substitute their views as to what conduct is anticompetitive. *E.g., Jack Walters*, 737 F.2d at 708-09 (maximum vertical price-fixing constitutes "lawful price competition" and therefore cannot cause antitrust injury); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197 (7th Cir. 1986) (discounter terminated in furtherance of minimum vertical price-fixing conspiracy does not suffer antitrust injury). These decisions have been criticized as "judicial attempts to undermine the political process by subordinating it to a particular economic view that has not itself attained sufficient support to be legislated into the antitrust laws." Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1022.

[14]The private litigants' confusion is compounded by the fact that the restrictive antitrust injury test overrules prior precedent and

Thus, in its application, the restrictive antitrust injury analysis radically departs from the purposes of the existing antitrust laws.[15] Whereas *Brunswick* established the antitrust injury requirement to preclude recoveries "divorce[d] . . . from the purposes of the antitrust laws" (429 U.S. at 487), the core concerns underlying the substantive antitrust laws are conspicuously absent from decisions applying the restrictive antitrust injury test. *E.g., In re Industrial Gas Antitrust Litigation,* 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.,* 460 U.S. 1016 (1983).

In ignoring the core antitrust concerns, the restrictive antitrust injury test undermines *sub silentio* the current antitrust laws. It eliminates plaintiffs whose lawsuits are consistent with the antitrust laws' interest in preserving the competitive process. This Court must forcefully and unequivocally reject the lower courts' subtle but persistent effort to eviscerate the antitrust laws through the guise of antitrust injury.

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excludes plaintiffs previously found to have suffered antitrust injury. For example, in its *Newman* opinion, the Ninth Circuit failed even to mention its two prior decisions finding that profit participants suffer antitrust injury from the defendant's violations after the agreements were executed. *See Aurora,* 688 F.2d at 692-93; *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971).

[15] Although some courts attempt to justify this test by citing fear of excessive treble damages litigation, this fear is groundless. In recent years, this Court has established adequate procedural safeguards to ensure the integrity of private antitrust actions. *E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752 (1984).

CONCLUSION

Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari to review the direct conflict between the antitrust injury standard articulated by this Court and that applied by the Ninth Circuit.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL NEWMAN, GEORGE R. HILL and PAN ARTS PRODUCTION CORP., Plaintiffs-Appellants, vs. UNIVERSAL PICTURES and M.C.A., INC. Defendants-Appellees.	No. 85-6347 D.C. # CV-85-2876-JMI (Central California) ORDER

Before: SCHROEDER and FLETCHER, Circuit Judges, and GEORGE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL NEWMAN, GEORGE R. HILL and PAN ARTS PRODUCTION CORP.,
Plaintiffs-Appellants,

v.

UNIVERSAL PICTURES and M.C.A., INC.,
Defendants-Appellees.

No. 85-6347
D.C. No. CV-85-2876-JMI
OPINION

Argued and Submitted
April 10, 1986—Pasadena, California

Filed April 6, 1987

Before: Mary M. Schroeder and Betty B. Fletcher, Circuit Judges, and Lloyd D. George.* District Judge.

Opinion by Judge Schroeder

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

SUMMARY

Antitrust

Appeal from judgment dismissing antitrust claim. Affirmed.

*Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

This action arises from appellee Universal Pictures' distribution of revenues from the sale and rentals of video cassette versions of the films "Slapshot" and "The Sting." Appellants Newman and Hill contracted with Universal to provide their services in the two films in exchange for a percentage of the revenues. Appellants allege that after the emergence of video cassette technology, Universal and other major motion picture studios conspired to fix the percentage of the revenue paid to artists, including Newman and Hill, for their services, in violation of sections 1 and 2 of the Sherman Act. They do not allege damages in connection with any film agreements entered into after the alleged conspiracy arose. The district court dismissed for failure to state an antitrust claim.

[1] To the extent the complaint alleges only a conspiracy to refuse to pay sums due under pre-conspiracy contracts, Universal's argument that the complaint cannot be read as an antitrust violation is correct. [2] The subsequent conspiracy could not have affected the competition for Newman and Hill's services at the time the contracts were made. [3] Allegations of price-fixing alone, unconnected to any of plaintiffs' activities for which damages are sought, do not set forth a claim under the antitrust laws. [4] The price-fixing conspiracy alleged in this case would clearly have affected competition for film contracts entered into during the existence of the conspiracy, but "Slapshot" and "The Sting" are not such films.

COUNSEL

Maxwell M. Blecher, Los Angeles, California, for the plaintiffs-appellants.

Stephen A. Kroft, Beverly Hills, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal from a district court judgment dismissing appellants' antitrust claim. Appellants are Paul Newman, a well-known film actor, George Roy Hill, a prominent film director, and Pan Arts Production Corporation, Hill's closely owned corporation (hereinafter "Newman and Hill"). Between 1972 and 1976, they contracted with appellee Universal Pictures to provide their services in two feature films, "Slapshot" and "The Sting," in exchange for a percentage of the revenues. They filed this action for damages arising out of Universal's distribution of revenues from the sale and rentals of video cassette versions of those films. Appellants allege in their complaint that after the emergence of video cassette technology in the early 1980s, Universal Pictures and other major motion picture studios conspired to fix the percentage of the revenue paid to artists, including Newman and Hill, for their services, in violation of sections 1 and 2 of the Sherman Act. Appellants allege that they therefore received smaller percentages of the cassette revenue for "The Sting" and "Slapshot" than they would otherwise have received. They do not allege damages in connection with any film agreements entered into after the alleged conspiracy arose. The district court dismissed for failure to state an antitrust claim. We affirm.

FACTS

In 1972, Newman entered into a written agreement with Universal in which Universal employed Newman to act in the motion picture "The Sting." In the same year, Hill entered into a written contract with Universal in which Universal employed Hill to direct "The Sting." Both of the 1972 contracts provided that Universal would pay Newman and Hill a contractually defined percentage of the proceeds derived from "The Sting." In 1974, after "The Sting" had been

released, Hill entered into a written contract in which Universal employed Hill and Pan Arts to direct three motion pictures, including "Slapshot." The contract provided that the compensation paid by Universal to Hill and Pan Arts would include a percentage of the net profits from "Slapshot." In 1976, Newman contracted with Universal to act in "Slapshot" in exchange for, inter alia, a percentage of gross proceeds and net profits from the film. Because Newman and Hill were to receive a percentage of film revenues, they are known as "profit participants."

By the early 1980s, after release of "The Sting" and "Slapshot," video disc and video cassette players had become a new medium for viewing feature films. Many studios, including appellee Universal Pictures, began to distribute films on video cassettes for home viewing. Universal has received substantial proceeds from sales and rental of video disc and video cassette versions of "The Sting" and "Slapshot."

In April 1985, Newman and Hill brought this suit against Universal Pictures under Section 4 of the Clayton Act, 15 U.S.C. § 15, seeking damages from Universal Pictures for its alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Appellants allege that in 1981, Universal conspired with other motion picture studios, including Columbia Pictures, Paramount Pictures, MGM/UA, Twentieth Century-Fox Film Corporation, and Warner Brothers, to apply the profit participation clauses in each of the studios' contracts in a manner that minimized the amount paid to the appellants and other artists.

Newman and Hill allege that rather than paying them the appropriate percentage of all revenues received from "The Sting" and "Slapshot," Universal Pictures and the other studios conspired to minimize this amount by classifying revenue received as "distribution" revenue, rather than production revenue. Under the terms of the contracts, the art-

ists were not entitled to a percentage of distribution revenue, and therefore the alleged conspiracy minimized the amount the studios actually paid to the appellants and other artists.

According to appellants, the alleged agreement to restrict the amount of money that the artists can receive from video cassette revenues constitutes a price-fixing conspiracy which prevents artists, whom appellants characterize as sellers of their services, from obtaining more favorable compensation from the studios, the buyers of the artists' services. In addition to the antitrust claim, the complaint includes pendent state law claims for breach of contract, breach of fiduciary duty, and for an accounting. All claims allege similar damages.

The district court granted Universal Pictures' motion to dismiss the antitrust claim under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim. The court dismissed the remaining state law claims, without prejudice, for lack of federal jurisdiction. Appellants then brought this appeal, in which the sole issue is whether the complaint states a claim for which relief can be granted under the antitrust laws.

DISCUSSION

We review *de novo* an order dismissing a complaint for failure to state a claim. *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 579 (9th Cir. 1981). A court may dismiss a complaint for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 760 (9th Cir. 1980).

Universal argues that the complaint cannot be read to allege an antitrust violation, because the appellants entered into these contracts before any conspiracy was alleged to have occurred. Therefore the conspiracy could have had no effect on competition for their services under the contracts for the production of "Slapshot" and "The Sting."

[1] To the extent the complaint alleges only a conspiracy to refuse to pay sums due under pre-conspiracy contracts, Universal Pictures is certainly correct, and appellants so acknowledge. Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce." Thus, while it is not always necessary to allege that a conspiracy unreasonably restrains trade, it is necessary to show that there is some restraint of trade. *See, e.g., Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 245 (1899); ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at 2. In *UNR Industries, Inc. v. Continental Insurance Co.,* 607 F. Supp. 855, 859-61 (N.D. Ill. 1984), the court held that allegations of a conspiracy to breach contracts were insufficient to state a claim under antitrust laws, because the plaintiff failed to show that the conspiracy served to restrain trade. Thus the court noted that "the Sherman Act does not outlaw every action that hurts consumer welfare, it outlaws '[e]very contract, combination . . . or conspiracy [ ] in *restraint of trade.*' " *Id.* at 859 (emphasis in original).

Appellants urge that the complaint is not limited to a contract claim, but that it alleges a sufficient antitrust claim as well. The complaint alleges that appellants' contracts were made before the video cassette technology was available to consumers, and that Universal and other studios conspired to adopt an interpretation of the contracts that minimized the compensation to be paid to profit participants. The complaint states that the defendants' conduct "has the effect . . . of artificially reducing the compensation paid to entities or persons entitled to a share of the proceeds or profits from exhibition of feature films on home video cassettes."

[2] Under the generous standard we apply to antitrust complaints, we must decide whether there is any set of facts consistent with the allegations of the complaint which would establish an antitrust injury to these plaintiffs with respect to the marketing of these films. None has been urged on us. Appellants' fundamental problem is that Newman and Hill entered into the contracts for "The Sting" and "Slapshot" between 1972 and 1976, before the alleged conspiracy arose in 1981. The subsequent conspiracy could not have affected the competition for Newman and Hill's services at the time the contracts were made. Furthermore, the alleged conspiracy could not have affected appellants' ability to negotiate with other studios for distribution of the video cassettes, because the existing contract covered distribution of the film in all forms. It is axiomatic that "[t]o constitute a Section 1 violation, the contract, combination, or conspiracy must be in restraint of trade." E. Kintner, 2 Federal Antitrust Law § 9.19 (1980). Thus, if the alleged conspiracy did not restrain competition for Newman and Hill's services in "The Sting" and "Slapshot," there can be no resulting antitrust violation.

Newman and Hill argue that they need not show antitrust injury because in analyzing a price-fixing conspiracy, an anticompetitive effect is presumed. Newman and Hill's complaint alleges a horizontal price-fixing agreement among buyers of services, which is illegal *per se*. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940). However, although the *per se* rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.

[3] This is because plaintiffs must allege an antitrust injury, which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[1] *Brunswick Corp. v. Pueblo Bowl-*

[1]Similar concepts sometimes have been expressed in terms of antitrust standing. *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1469 n.2 (9th Cir.

O-Mat, Inc., 429 U.S. 477, 489 (1977). *See also John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977); *Snyco, Inc. v. Penn Central Corp.*, 551 F. Supp. 949, 951-52 (E.D. Penn. 1982). Allegations of price-fixing alone, unconnected to any of plaintiffs' activities for which damages are sought, do not set forth a claim under the antitrust laws. *See Fields Productions, Inc. v. United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

[4] The price fixing conspiracy alleged in this case would clearly have affected competition for film contracts entered into during the existence of the conspiracy, but "Slapshot" and "The Sting" are not such films. Hill and Newman may have other claims in connection with contracts made after 1980, but they are not asserted here.

Affirmed.

Judge George may file a separate statement at a later date.

1985). Courts have also asked whether the plaintiff fell within the "target area" of the violation, or inquired into the "directness" or "indirectness" of the injury, or conducted an analysis of proximate cause. For commentary on the confusion engendered by these disparate approaches, *see Associated General Contractors of California, Inc. v. State Council of Carpenters*, 459 U.S. 519, 535-38 & 536 nn. 31-33; *Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1471-79 (N.D. Cal. 1984).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL NEWMAN, GEORGE ROY HILL and PAN ARTS PRODUCTION CORPORATION, Plaintiffs, vs. UNIVERSAL PICTURES, a Division of UNIVERSAL CITY STUDIOS, INC. and MCA, INC. Defendants.	NO. 85 2876 JMI (Px) ORDER GRANTING MOTION TO DISMISS COMPLAINT

APPENDIX C

Defendants' Motion To Dismiss Complaint came on regularly for hearing before the Court on Monday, September 9, 1985, the Honorable James M. Ideman, Judge presiding, and the plaintiffs having appeared by their counsel, Blecher, Collins & Weinstein and Maxwell M. Blecher and Robert M. Lindquist, and defendants having appeared by their counsel, Rosenfeld, Meyer & Susman and Stephen A. Kroft and Kirk M. Hallam, and the Court having considered the Motion, and all papers and documents filed by the parties in support of and in opposition thereto, and having heard argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss Complaint is granted.

2. Count One of the Complaint (Antitrust Violations) is dismissed with prejudice. Counts Two through Four, inclusive, of the Complaint (Pendent State Law Claims) are dismissed without prejudice.

DATED: SEP 12 1985

James M. Ideman

JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN J. STUMREITER
KIRK M. HALLAM

By Stephen A. Kroft

STEPHEN A. KROFT
Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL NEWMAN, et al., PLAINTIFF(S)	CASE NUMBER CV 85-2876-JMI Px)
VS UNIVERSAL PICTURES DEFENDANT(S)	NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that Order Granting Motion To Dismiss Complaint. in the above entitled case was entered in the docket on 9-16-85.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action,

hereby certify that on 9-16-85, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Stephen A. Kroft
Rosenfeld, Meyer & Susman
9601 Wilshire Blvd.
Suite 444
Beverly Hills, CA. 90210

CLERK, U. S. DISTRICT COURT

By F.BLAIR ROBINSON
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 29, 1988, I served the within *Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stephen A. Kroft, Esq.
Rosenfeld, Meyer & Susman
9601 Wilshire Boulevard
Fourth Floor
Beverly Hills, California 90210

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 29, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)